

AMENDED IN SENATE JUNE 17, 2015

AMENDED IN SENATE JUNE 4, 2015

AMENDED IN ASSEMBLY APRIL 15, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 929

Introduced by Assembly Member Chau

February 26, 2015

An act to add Sections 638.50, 638.51, 638.52, and 638.53 to the Penal Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 929, as amended, Chau. Pen registers: authorized use.

Existing law authorizes the Attorney General or a district attorney to make a written application to a judge of a superior court for an order permitting the interception of wire communication and electronic communication, as defined. Existing law permits an application to be made informally and granted orally if an emergency situation exists, and other factors are present. Existing law conditions the granting of an oral approval on the filing of a written application by midnight of the second full court day after the oral approval is made. Existing law prohibits a communication interception from lasting for longer than 30 days. Existing law permits an extension of the original order, not to exceed 30 days, upon a showing that there is continued probable cause that the information sought is likely to be obtained under the extension.

This bill would prohibit a person, other than a provider of electronic or wire communication service for specified purposes, from installing or using a pen register or a trap and trace device, as defined. The bill would authorize a peace officer to make a written application to a

magistrate for an order permitting the installation and use of a pen register or a trap and trace device. The bill would require the magistrate to enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device only in specified circumstances and would permit the magistrate to question the peace officer pertaining to the need for the information. The bill would also permit an application to be made informally and granted orally if an emergency situation exists, and other factors are present. The bill would condition the grant of an oral approval on the filing of a written application by midnight of the second full court day after the pen register or trap and trace device is installed. The bill would prohibit the installation and use of a pen register or trap and trace device for longer than 60 days. The bill would permit an extension of the original order, not to exceed 60 days, upon a showing that there is continued probable cause that the information sought is likely to be obtained under the extension. The bill would clarify that any location information obtained by a pen register or a track and trace device is limited to the information that can be determined from the telephone number.

The bill would make the prohibited installation or use of a pen register or a trap and trace device punishable by a fine not exceeding \$2,500, or by imprisonment in the county jail not exceeding 1 year, or by imprisonment in state prison for offenders with specified prior convictions, or by both that fine and imprisonment. By creating a new crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 638.50 is added to the Penal Code, to
- 2 read:
- 3 638.50. For purposes of this chapter, the following terms have
- 4 the following meanings:
- 5 (a) "Wire communication" and "electronic communication"
- 6 have the meanings set forth in subdivision (a) of Section 629.51.

1 (b) “Pen register” means a device or process that records or
2 decodes dialing, routing, addressing, or signaling information
3 transmitted by an instrument or facility from which a wire or
4 electronic communication is transmitted, but not the contents of a
5 communication. “Pen register” does not include a device or process
6 used by a provider or customer of a wire or electronic
7 communication service for billing, or recording as an incident to
8 billing, for communications services provided by such provider,
9 or a device or process used by a provider or customer of a wire
10 communication service for cost accounting or other similar
11 purposes in the ordinary course of its business.

12 (c) “Trap and trace device” means a device or process that
13 captures the incoming electronic or other impulses that identify
14 the originating number or other dialing, routing, addressing, or
15 signaling information reasonably likely to identify the source of
16 a wire or electronic communication, but not the contents of a
17 communication.

18 SEC. 2. Section 638.51 is added to the Penal Code, to read:

19 638.51. (a) Except as provided in subdivision (b), a person
20 may not install or use a pen register or a trap and trace device
21 without first obtaining a court order pursuant to Section 638.52 or
22 638.53.

23 (b) A provider of electronic or wire communication service may
24 use a pen register or a trap and trace device for any of the following
25 purposes:

26 (1) To operate, maintain, and test a wire or electronic
27 communication service.

28 (2) To protect the rights or property of the provider.

29 (3) To protect users of the service from abuse of service or
30 unlawful use of service.

31 (4) To record the fact that a wire or electronic communication
32 was initiated or completed to protect the provider, another provider
33 furnishing service toward the completion of the wire
34 communication, or a user of that service, from fraudulent, unlawful,
35 or abusive use of service.

36 (5) If the consent of the user of that service has been obtained.

37 (c) A violation of this section is punishable by a fine not
38 exceeding two thousand five hundred dollars (\$2,500), or by
39 imprisonment in the county jail not exceeding one year, or by

1 imprisonment pursuant to subdivision (h) of Section 1170, or by
2 both that fine and imprisonment.

3 (d) A good faith reliance on an order issued pursuant to Section
4 638.52, or an authorization made pursuant to Section 638.53, is a
5 complete defense to a civil or criminal action brought under this
6 section or under this chapter.

7 SEC. 3. Section 638.52 is added to the Penal Code, to read:

8 638.52. (a) A peace officer may make an application to a
9 magistrate for an order or an extension of an order authorizing or
10 approving the installation and use of a pen register or a trap and
11 trace device. The application shall be in writing under oath or
12 equivalent affirmation, and shall include the identity of the peace
13 officer making the application and the identity of the law
14 enforcement agency conducting the investigation. The applicant
15 shall certify that the information likely to be obtained is relevant
16 to an ongoing criminal investigation and shall include a statement
17 of the offense to which the information likely to be obtained by
18 the pen register or trap and trace device relates.

19 (b) ~~(1)~~—The magistrate shall enter an ex parte order authorizing
20 the installation and use of a pen register or a trap and trace device
21 if he or she finds that the information likely to be obtained by the
22 installation and use of a pen register or a trap and trace device is
23 relevant to an ongoing investigation and that there is probable
24 cause to believe that the pen register or trap and trace device will
25 lead to any of the following:

26 ~~(A)~~

27 (1) Recovery of stolen or embezzled property.

28 ~~(B)~~

29 (2) Property or things used as the means of committing a felony.

30 ~~(C)~~

31 (3) Property or things in the possession of a person with the
32 intent to use them as a means of committing a public offense, or
33 in the possession of another to whom he or she may have delivered
34 them for the purpose of concealing them or preventing them from
35 being discovered.

36 ~~(D)~~

37 (4) Evidence that tends to show a felony has been committed,
38 or tends to show that a particular person has committed or is
39 committing a felony.

40 ~~(E)~~

(5) Evidence that tends to show that sexual exploitation of a child, in violation of Section 311.3, or possession of matter depicting sexual conduct of a person under 18 years of age, in violation of Section 311.11, has occurred or is occurring.

~~(F)~~

(6) The location of a person who is unlawfully restrained or reasonably believed to be a witness in a criminal investigation or for whose arrest there is probable cause.

~~(G)~~

(7) Evidence that tends to show a violation of Section 3700.5 of the Labor Code, or tends to show that a particular person has violated Section 3700.5 of the Labor Code.

~~(H)~~

(8) Evidence that does any of the following:

~~(i)~~

(A) Tends to show that a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code, has been committed or is being committed.

~~(ii)~~

(B) Tends to show that a particular person has committed or is committing a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code.

~~(iii)~~

(C) Will assist in locating an individual who has committed or is committing a felony, a misdemeanor violation of the Fish and Game Code, or a misdemeanor violation of the Public Resources Code.

~~(2) The magistrate shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device if he or she finds that information likely to be obtained by the installation and use of a pen register or a trap and trace device is relevant to an ongoing search and rescue investigation of a person who is or is believed to be in danger because of age, health, mental or physical disability, environmental or weather conditions, that the person is in the company of a potentially dangerous person, or that there are other factors indicating that the person may be in peril.~~

(c) Information acquired solely pursuant to the authority for a pen register or a trap and trace device shall not include any

1 information that may disclose the physical location of the
2 subscriber, except to the extent that the location may be determined
3 from the telephone number. Upon the request of the person seeking
4 the pen register or trap and trace device, the magistrate may seal
5 portions of the application pursuant to *People v. Hobbs* (1994) 7
6 Cal.4th 948, and Sections 1040, 1041, and 1042 of the Evidence
7 Code.

8 (d) An order issued pursuant to subdivision (b) shall specify all
9 of the following:

10 (1) The identity, if known, of the person to whom is leased or
11 in whose name is listed the telephone line to which the pen register
12 or trap and trace device is to be attached.

13 (2) The identity, if known, of the person who is the subject of
14 the criminal investigation.

15 (3) The number and, if known, physical location of the telephone
16 line to which the pen register or trap and trace device is to be
17 attached and, in the case of a trap and trace device, the geographic
18 limits of the trap and trace order.

19 (4) A statement of the offense to which the information likely
20 to be obtained by the pen register or trap and trace device relates.

21 (5) The order shall direct, if the applicant has requested, the
22 furnishing of information, facilities, and technical assistance
23 necessary to accomplish the installation of the pen register or trap
24 and trace device.

25 (e) An order issued under this section shall authorize the
26 installation and use of a pen register or a trap and trace device for
27 a period not to exceed 60 days.

28 (f) Extensions of the original order may be granted upon a new
29 application for an order under subdivisions (a) and (b) if the officer
30 shows that there is a continued probable cause that the information
31 or items sought under this subdivision are likely to be obtained
32 under the extension. The period of an extension shall not exceed
33 60 days.

34 (g) An order or extension order authorizing or approving the
35 installation and use of a pen register or a trap and trace device shall
36 direct that the order be sealed until otherwise ordered by the
37 magistrate who issued the order, or a judge of the superior court,
38 and that the person owning or leasing the line to which the pen
39 register or trap and trace device is attached, or who has been
40 ordered by the court to provide assistance to the applicant, not

1 disclose the existence of the pen register or trap and trace device
2 or the existence of the investigation to the listed subscriber or to
3 any other person, unless or until otherwise ordered by the
4 magistrate or a judge of the superior court, or for compliance with
5 Sections 1054.1 and 1054.7.

6 (h) Upon the presentation of an order, entered under subdivisions
7 (b) or (f), by a peace officer authorized to install and use a pen
8 register, a provider of wire or electronic communication service,
9 landlord, custodian, or other person shall immediately provide the
10 peace officer all information, facilities, and technical assistance
11 necessary to accomplish the installation of the pen register
12 unobtrusively and with a minimum of interference with the services
13 provided to the party with respect to whom the installation and
14 use is to take place, if the assistance is directed by the order.

15 (i) Upon the request of a peace officer authorized to receive the
16 results of a trap and trace device, a provider of a wire or electronic
17 communication service, landlord, custodian, or other person shall
18 immediately install the device on the appropriate line and provide
19 the peace officer all information, facilities, and technical assistance,
20 including installation and operation of the device unobtrusively
21 and with a minimum of interference with the services provided to
22 the party with respect to whom the installation and use is to take
23 place, if the installation and assistance is directed by the order.

24 (j) Unless otherwise ordered by the magistrate, the results of
25 the pen register or trap and trace device shall be provided to the
26 peace officer at reasonable intervals during regular business hours
27 for the duration of the order.

28 (k) The magistrate, before issuing the order pursuant to
29 subdivision (b), may examine on oath the person seeking the pen
30 register or the trap and trace device, and any witnesses the person
31 may produce, and shall take his or her affidavit or their affidavits
32 in writing, and cause the affidavit or affidavits to be subscribed
33 by the parties making them.

34 SEC. 4. Section 638.53 is added to the Penal Code, to read:

35 638.53. (a) Except as otherwise provided in this chapter, upon
36 an oral application by a peace officer, a magistrate may grant oral
37 approval for the installation and use of a pen register or a trap and
38 trace device, without an order, if he or she determines all of the
39 following:

1 (1) There are grounds upon which an order could be issued
2 under Section 638.52.

3 (2) There is probable cause to believe that an emergency
4 situation exists with respect to the investigation of a ~~crime or a~~
5 ~~search and rescue investigation.~~ *crime*.

6 (3) There is probable cause to believe that a substantial danger
7 to life or limb exists justifying the authorization for immediate
8 installation and use of a pen register or a trap and trace device
9 before an order authorizing the installation and use can, with due
10 diligence, be submitted and acted upon.

11 (b) (1) By midnight of the second full court day after the pen
12 register or trap and trace device is installed, a written application
13 pursuant to Section 638.52 shall be submitted by the peace officer
14 who made the oral application to the magistrate who orally
15 approved the installation and use of a pen register or trap and trace
16 device. If an order is issued pursuant to Section 638.52, the order
17 shall also recite the time of the oral approval under subdivision
18 (a) and shall be retroactive to the time of the original oral approval.

19 (2) In the absence of an authorizing order pursuant to paragraph
20 (1), the use shall immediately terminate when the information
21 sought is obtained, when the application for the order is denied,
22 or by midnight of the second full court day after the pen register
23 or trap and trace device is installed, whichever is earlier.

24 (c) A provider of a wire or electronic communication service,
25 landlord, custodian, or other person who provides facilities or
26 technical assistance pursuant to this section shall be reasonably
27 compensated by the requesting peace officer's law enforcement
28 agency for the reasonable expenses incurred in providing the
29 facilities and assistance.

30 SEC. 5. No reimbursement is required by this act pursuant to
31 Section 6 of Article XIII B of the California Constitution because
32 the only costs that may be incurred by a local agency or school
33 district will be incurred because this act creates a new crime or
34 infraction, eliminates a crime or infraction, or changes the penalty
35 for a crime or infraction, within the meaning of Section 17556 of
36 the Government Code, or changes the definition of a crime within
37 the meaning of Section 6 of Article XIII B of the California
38 Constitution.

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